UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ATLAS REFINERY, INC.,	)	Case: 22-CA-28403
	)	
and	)	
	)	
	)	
LOCAL 4-406, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED, INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO	)	

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

COMES NOW, Respondent, ATLAS REFINERY, INC. (hereinafter "Atlas"), pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, (hereinafter "Board" or "NLRB"), files its Brief in Support of Respondent's Exceptions to the August 7, 2009 Decision of the Administrative Law Judge Michael A. Rosas.

I. Introduction

Respondent, Atlas Refinery Inc. ("Atlas"), files this Brief in Support of its Exceptions to the Decision of the Administrative Law Judge of the National Labor Relations Board ("NLRB"), Michael Rosas, dated August 7, 2009. Case No. 22-CA-28403 was the trial of charges filed by Local 4-406, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied, Industrial and Service Workers International

Union, AFL-CIO (the "Union"), against Atlas on June 10, 2008, which was amended on June 24, 2008 and again on July 24, 2008 . In short, the Complaint alleged that Atlas interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act (¶25); discriminated in regard to the hire or tenure or terms or conditions of employment of its employees, and thereby discouraged membership in a labor organization in violation of Sections 8(a)(1) and (3) of the Act (¶26); failed and refused to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees in violation of Sections 8(a)(1) and (5) of the Act (¶27). Atlas vehemently denied the Charges.

After a six (6) day trial in Newark, New Jersey, the ALJ concluded:

(1) The Company violated §8(a)(5) and 8(a)(1) of the Act by refusing to bargain with the Union as long as Jeff Gilliam was part of the bargaining committee, unilaterally implementing new terms and conditions of employment on June 9, 2008 without affording the Union an opportunity to bargain, and locking out employees.

(2) The Company violated §8(a)(1) of the Act by threatening to discharge employees who would not return to work under the new terms and conditions of employment implemented by the Company and soliciting employees to withdraw from the Union; and

(3) The Company violated §8(a)(3) and 8(a)(1) of the Act by discharging Gilbert Alers, Raymond Ardiente, Bibiano Dechavez, Aybar Braudillo and Alexander Nunez because they supported the Union's efforts to continue collective bargaining.

II. PRELIMINARY STATEMENT

This case is about six issues.

A. The Appropriateness of the Company's Response to the Unannounced Arrival of Jeff Gilliam at the Negotiations.

The first issue is whether Atlas acted appropriately when it objected and sought guidance from the NLRB (through the prompt filing of an Unfair Labor Charge) after the Union's bad faith disruption of negotiations by bringing Jeff Gilliam. Gilliam had previously defrauded the Company by calling in "sick" and using personal days, which fraud enabled him to work full time for another employer *while collecting full pay and benefits from the Company.* The Union used its protected right to bargain with a representative of their own choosing under the Act as a veil to hide their transparent attempt to derail the negotiations. The Company's response to the inflammatory and toxic behavior of the Union in objecting to Gilliam's participation in the negotiations and in seeking guidance form the NLRB, was lawful and appropriate, and did not constitute a violation of Section 8 (a) (1) or (5) of the National Labor Relations Act.

B. The "Unilateral Change in the Terms and Conditions of Employment",

The issue here is whether the Company acted lawfully in implementing terms and conditions of employment when after the parties had reached an impasse on June 2, 2008, the Union rejected the Company's final proposal and its revised final proposal. By that point in time, the Company had already afforded the Union the opportunity to bargain with the Company before *and after* the expiration the CBA between the parties, over the course of three months and nine bargaining sessions, which included two 30-

day contract extensions. There was no legal obligation on the part of the Company, after impasse was reached, to continue negotiating with the Union.

C. The "Lockout".

Whether the ALJ erred in concluding that Atlas' actions in keeping the plant open for production and in offering all employees who wanted to work the opportunity to come to work and to complete work on June 9, 2008 fairly constituted a "lockout" in violation of §8(a) (5) and 8(a) (1) of the Act. The Company kept the plant open for production. The Company invited all employees to come work. The Company also afforded all workers with the opportunity to complete work. Even though work was conditioned upon the acceptance of the terms and conditions of the revised final offer, work was available for any employee who wanted to work. A lockout has a very narrow and precise meaning which in its essence is the withholding of work and of the opportunity to complete work. No such withholding occurred on June 9, 2008 and the ALJ erred when he concluded that the actions of the Company on June 9, 2008 constituted a violation of §8(a) (5) and 8(a)(1) of the Act.

D. The Attribution of the Ultravires Actions of Julian Stacy to the Company.

The issue with regard to Julian Stacey is whether the ALJ erred in finding that the Julian Stacy, was acting within the scope of his agency as the Company's Plant Manager, when he called Alers to urge him to return to work. There was no evidence adduced at trial to substantiate the ALJ's "finding" that the Company had asked him to call Alers and advise him of the probable consequence of his failure to return to work. The ALJ assumed that because Stacey was Atlas' Plant Manager , he was acting in the

scope of his authority or at its request when he implored Alers to return to work. There was no evidence in the record to support that assumption.

E. The Ministerial Acts by Atlas did not Constitute a Solicitation to Withdraw from the Union.

The issue here is whether the ALJ erred concluding that Company violated §8(a)(1) of the Act when it granted Les Porzio's request to photocopy a letter *he had written* which letter was a form letter to effectuate the resignation of any employees who desired to resign from the Union. The ALJ ignored the fact that Les Pozio had a history of prior dealings with the Union that had left him bitter against the Union, which bitterness, or animus, was *entirely independent from any influence of Atlas.* The ALJ ignored the uncontradicted evidence presented at Trial that Porzio, acting on his own initiative, not Atlas, wrote the letter. Finally, the ALJ's characterization of the duplication of such a letter as a "solicitation of employees to withdraw from the Union by Atlas," was a overstatement of an action that was *nothing more than ministerial.*

F. The Discharge of Bargaining Unit Members.

The issue is whether the ALJ erred when he found that the Company unlawfully discriminated against employees and thereby discouraged their membership in a labor Union when it legally terminated those employees who chose not to return to work on June 9, 2008, upon the lawfully implemented terms and conditions of employment. Here, the Company did not engage in discriminatory conduct in terminating the employees. It exercised its lawful right to terminate any employee who failed to show up for work.

II. STATEMENT OF THE FACTS

A. Background

Atlas and the Union were parties to a Collective Bargaining Agreement ("CBA") executed on or about April 4, 2003 with effective dates from March 27, 2003 through to April 9, 2008.

B. Negotiations

On January 22, the Union mailed a letter to the Company, to the attention of a former vice president of Atlas named Webber, requesting bargaining for a new contract. GC Exhibit 2. It was uncontroverted at trial that the former vice president to whom the letter was addressed to an employee who was no longer employed by the Company for two years. R. 1. Though it was signed for by a receptionist, (CP Exhibit 2; Tr. 681-682), Schroeder did not receive it. More than a month later, on February 27, 2008, the Union sent another letter requesting that the parties to begin negotiations. R. Exhibit 1. No testimony was adduced or proffered at trial as to why the Union waited five weeks to reach out to the Company after receiving no response to its original misaddressed letter inviting the Company to begin negotiations.

Prior to the expiration of the CBA, Atlas and the Union met on March 11, 2008 for the first negotiations meeting. (Tr. 26-34, 133-139, 155, 286, 447-448, 556). At this meeting the Union presented its proposal with regard to a new contract including, amongst other demands, annual wage increases of 10% per year, additional holiday and vacation time, as well as enhanced health care benefits.

At the second negotiations meeting, conducted on March 19, 2008, Atlas presented a detailed overview of its dire economic state, the circumstances leading up

to the economic problems Atlas was currently facing, and the actions taken to date to improve Atlas' financial condition. This analysis presented to the Union included an economic analysis of the cuts made to the management staff and administrative staff to reduce costs, including the elimination of positions, the consolidation of responsibilities, and reduction in compensation over not just the current year, 2008, but since 2003. *The Company conveyed through counsel that it could not afford to maintain the current level of wages and benefits* and provided a proposal for a new contract. The proposal reflected willingness to modify the union-security clause and called for reduction of recall rights to 90 days; reduction in Holidays by 1 day; elimination of severance pay; the reduction of sick leave from 12 to 5 days, for all employees; reduction of the Company's pension contributions; increasing the employees share of the costs of health benefits from 35 to 70 per cent; an ability to change the health plans without Union Consultation; elimination of the lump sum payments; and a reduction in wages. The Contract proposal did not specify a term. (GC Exhibits 5-6, 34; Tr. 37-45, 159-160,163, 286, 449, 559-560).

The Union responded by requesting 3 years of audited financial documents from the Company which were provided by Atlas. On or about April 1, Krand emailed the Company's representatives and stated that the economic issues can be addressed at a later date when the audit is completed. He further proposed that due the parties discuss "non-economic language of our proposals." On behalf of Atlas, Ryan responded the same day by email and letter acknowledging "that we cannot proceed with the negotiations on economic issues pending a review of final documentation by the Union," but asked "," if the Union is agreeable to move forward with negotiation on non-

monetary topics." Ryan listed eight topics considered by the Company to be non-monetary as follows: leave of absence; notification periods for layoff and work changes; number of days for recall rights; creation and deletion of jobs; work hours; union size committees; moving and successor clause; and transfer language. R. Exhibits 6-7.

The parties held their third bargaining session on April 4, 2008. During this bargaining session, the Union further addressed the initial proposals of March 11. The Company also sought to discuss the economic issues including those contained in its proposal. The Union refused, however, noting that it needed more time to review the Company's financial information. After further discussion, the Union withdrew its proposal for one extra week of vacation and the parties reached a tentative agreement regarding the Union's name change, the frequency of Union dues deductions, and extended the expiration date of the contract from April 9 to May 9. The extension agreement was signed on April 8. GC 7-9, 34; Tr. 42-49, 294-296, 459-461.

On April 8, 2008, an Extension Agreement to the contract which was due to expire on April 9, 2008, was executed by the parties.

The parties held their fourth bargaining session on April 10. During this bargaining session, the Union withdrew its demand for a wage increase commensurate with a union dues increase and the parties reached tentative agreements concerning four Company proposal: modify notice period for hourly work assignments to two weeks (a modification of Art. 6.3); remove provision regarding "Alternate Day Man" (Art 6.4.D); upgrading work week provision "to include 7/3/07 amendment" (Art. 6.6.A); and limiting personal leave up to six months. In addition, the parties entered into confidentiality agreements regarding the production of the Company's financial information. Later that

afternoon, Schroeder forwarded the Company's audited Financial Statement for 2005, 2006, 2007 (Tr. 54-58, 299-301, 462-463, 505-506; GC Exh. 8, 10-12, 34; R. Exh. 9).

A fifth bargaining session was held on May 6. During that bargaining session, the Union withdrew its proposals 30 and 32 which related to an increase in the shoe allowance and added the work rules into the Agreement. The Company withdrew its proposal to eliminate advance vacation pay. In addition, the parties agreed on proposals made by the Company: work rules --- no change; job descriptions --- no change; and reduction of the vacation request of 4 to 2 weeks (Art. 7.2.C.). (Tr. 58-59, 464-465; GC Exhbits. 13-14, 34).

The parties held their sixth (6^{th}) bargaining session on May 8^{th} at the Company's facility in Newark. During a morning session that lasted approximately five (5) hours, the Union withdrew six (6) of its proposals: two changes regarding hours of work and overtime (ART. 6.3, 6.4, and 6.8.a), two changes regarding holidays (ART. 6.9), vacation (ART. 7.1), and sick leave (ART. 8.1.1). Atlas withdrew three of its proposals: removing provision relating to eyeglass coverage (ART. 14.3); requiring grievant to be present at all step meetings (ART. 11.2); and no rate changes for transfers based on seniority (ART. 4.1.k). The parties also agree to the Union's proposal to protect shop stores from losing pay while involved in contract negotiations (ART. 11). GC exhibit 16. Before the parties broke for lunch at the Union's request at approximately 1:30 p.m., Krand informed the company that the Union was willing to discuss economic issues during the afternoon session. Tr. 63-64, 468-69; (GC Exhibit 15, 34).

After lunch, the Union disruption of negotiations in bad faith by bringing Jeff Gilliam, the personification of ill will between the parties, to the negotiations without any

prior notice to the Company. Gilliam had previously defrauded the Company by calling in "sick, " and using personal and vacation days as well as a contrived leave of absence to work for the Union, which fraud enabled him to work full time for another employer, Ashland Chemical Company, *while collecting full pay and benefits from the Company.* He was not even a member of the Union at the time of the negotiations. The ill will between Atlas and Gilliam was so great, it can very fairly be stated that the Union's invitation of Jeff Gilliam the negotiations was the toxic equivalent of the cheating spouse's invitation of his former mistress to a marriage counseling session where the parties are working to salvage the marriage. Hiding behind the veil of its protected right to bargain with a representative of their own choosing under the Act as a veil to hide their transparent attempt to derail the negotiations. R. 19-20.

The Company's response to the inflammatory and toxic behavior of the Union was to object to Gilliam's participation in the negotiations and to seek guidance form the NLRB by filing an Unfair Labor Practice Charge the next day, May 9, 2008, followed by further submissions in support of the Unfair Labor Charge on May 22, 2008 and June 3, 2008. R. 19-20. Respondent and the Union continued negotiations without the participation of Gilliam and the charge was subsequently withdrawn. Thereafter, a negotiation session was conducted on May 14, 2008, without substantial progress.

C. Mediation

Subsequently, the parties agreed to continue negotiations with the assistance of Guy Serota and James P. Kinney, Federal Mediators with the Federal Mediation and Conciliation Service. In anticipation of those continued negotiations, the Union requested additional financial information from Atlas which was provided by e-mail to

the Union's financial analyst. The additional financial documentation included audited financial statements for Atlas for 2003, 2004, 2005 and 2006; as well as the "draft" copy of the recently prepared audited 2007 numbers. Atlas also provided to the Union Atlas' 2008 financial forecast (with first quarter actuals) which had been presented to Atlas' Board of Directors and Atlas' lender (Bank of America). Atlas' primary lender, Bank of America, was threatening to foreclose on Atlas' loans of approximately $1,800,000. Atlas' tax returns were also provided to the Union.

Two mediation sessions were conducted on May 27, 2008 wherein the Company sought cuts in benefits and holidays while the Union was still seeking increases. Tr. 480-481,564). At the June 2, 2008, but a settlement was not achieved where the Company sought further cuts, At the mediation session on June 2, 2008, Mediators Serota and Kinney confirmed that the parties were "at impasse" and they did not see any further progress being made. Mediator Serota recommended that Atlas present "a last and final offer" to the Union in anticipation of the CBA's expiration on June 6, 2008. Atlas, utilizing Mr. Schroeder's laptop computer and the Mediation Service's printer, prepared a final proposal dated June 2, 2008.

D. Last and Final Offer Refused

In the presence of the mediators, Atlas' final proposal was presented to the Union on June 2, 2008. Atlas stated to the Union that this was a final proposal and that there would be no further extensions to the CBA which would expire at midnight on June 6, 2008.

The Union did not respond to Atlas' June 2, 2008 final proposal on June 3, June 4, or June 5, 2008. After a final attempt to reach settlement by making minor

modifications to their offer, on June 6, 2008, the date the contract would expire, the Union communicated with Atlas, advising that they would not accept Atlas' revised final offer. The contract expired at midnight on June 6, 2008 without the parties agreeing upon an extension, nor agreeing upon a new contract. There was never an offer to waive retroactivity of any settlement or new Contract. (GC Exhibits 9, 18, 26-28; Tr. 93-95, 492-494, 586).

The Union leadership came to Atlas' offices on Monday morning, June 9, and the leadership informed Atlas that they did not accept Respondent's final offer. The Union representatives stated they would not have the men consider the offer, they would "not vote on it".

E. Return of Employees to Work

The Union representatives returned to the employees who were gathered outside the plant the morning of June 9, 2008. Atlas representatives Steve Schroeder, Jr., Bill Bauman and Julian Stacey went out to the gate where the employees had gathered, along with their Union representatives. Atlas stated they were open for business and all employees were welcome to continue working under the terms of Atlas' final offer.

At 6:45 a.m. four employees reported to work. At 7:30 a.m. a fifth employee reported to work. At 9:00 a.m. a sixth employee reported to work. At 1:00 p.m. a seventh employee telephoned from Florida (where he was on approved time off) and stated he would be reporting to work on the following Monday, at the conclusion of his time off. On June 10, 2008, at 6:15 a.m., an eighth employee reported to work. The five employees who chose not to return to work on June 9 or June 10 were terminated due to their failure to report to work. A letter confirming the termination was issued to

each of these individuals along with confirmation that under separate cover they would be receiving information with regard to benefit continuation and their COBRA rights. Subsequently, the Union filed charges against Atlas which have resulted in the Complaint issued by the NLRB. Tr. 96-97, 108, 110, 247,614; 387-390, 414, 419-430, 433-436, 495, 571-573, 611-613, 626, 637-638; GC Exhibit 31.)

On June 9, 2008, Les Porzio, asked Atlas it would duplicate the letter he had written. The letter was a proposed resignation letter for employees who wanted to resign from the Union could sign. The Company duplicated the letter. Tr. 234-235, 240-267; GC Exhibit 33). The Company did not ask any employees to sign the letter nor did it direct Les Porzio to do on its behalf.

IV. ARGUMENT

POINT I: Atlas Responded Properly to the Union's Bad Faith Attempt to Disrupt the Negotiations by Inviting Gilliam to the Negotiations without any Prior Notice to Atlas by Objecting and Seeking Guidance from the NLRB (Exceptions 2, 13 and 14).

The Union's invitation of Gilliam to the bargaining table was a deliberate bad faith attempt to derail negotiations between the parties just as they were to reach the economic issues. Gilliam's prior conduct in defrauding the Company by working else where while he was employed at Atlas through the dishonest use of "sick" days, personal days, and vacations days, was known to the Union. The Union hid behind a veil of the right to choose its own representative for bargaining while it purposefully derailed the negotiations in bad faith.

> For purposes of this section, **to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment**, or the negotiation of an agreement, or any question arising

> there under, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession...

29 U.S.C.A. 158 (d) (emphasis added).

The CBA between Atlas and the Union provided that the "Union Committee" shall consist of three "plant representatives" and one alternate. One of the three "plant representatives" shall also serve as Chairman/Chief Steward. §11.1. In contrast, the CBA elsewhere provides that "Representatives of the Local and/or International Union shall have the right to attend any Safety Meetings". §12.2. The terms "plant representatives" and "representatives of the Union" are different terms. Plant representatives were to be part of the Union Committee, but Union representatives were permitted to attend safety meetings. As previously noted, following the termination of his employment, the Union replaced Gilliam as the Shop Steward and as Chairman of the three-man Union Committee. The three man Union Committee, including Gilliam's replacement, attended every negotiations meeting, including the session on May 8, 2008.

Since Gilliam was no longer an Atlas employee, he was no longer a working member of the Union. While Unions may generally appoint Union representatives who are not Atlas employees to be negotiators, in this case, Gilliam and the Union committed a fraud and acted in bad faith. Gilliam's work for the Union remains unsubstantiated. Since January 8, 2008, Gilliam has been working full time as a Chemical Operator for Ashland Chemical Company. The Union acted in bad faith and fraudulently by bringing Gilliam to the bargaining table. Atlas was at all times willing to bargain in good faith, but was legitimately concerned with communication and negotiations with Gilliam's sudden and unexplained presence, if Gilliam acted as the Union representative.

> The general law on good-faith bargaining is quite clear... Each party to the collective bargaining process has a right to choose its representative, and there is a correlative duty on the opposite party to negotiate with the appointed agent.
> However, **this rule is not absolute or immutable**... in ***NLRB v. Kentucky Utilities Co.***, 182 F.2d 810 (6 Cir. 1950), it was held that it was not an unfair labor practice for an employer to refuse to negotiate with a union representative who had **evidenced hostility to it** by his past activities... His expressed hostility to the respondent and his purpose to destroy the respondent financially made any attempt at good faith collective bargaining a futility. Just as collective bargaining in form only and lacking in substance has been condemned, certainly **collective bargaining in from [sic] only without good faith negotiating on the other side should not be required**.'
> ... The employer was found not to have committed an unfair labor practice when it refused to negotiate with a union conducting a competitive business...

NLRB v. International Ladies' Garment Workers' Union, AFL-CIO, 274 F.2d 376, 378 (3d Cir. 1960) (emphasis added)(citations omitted).

The Court in ***International Ladies' Garment Workers' Union*** held that in selecting and insisting upon an individual who held highly confidential positions as its bargaining representative, the union's offer to bargain was not made in good faith. 274 F.2d at 379.

There are exceptions to the general rule that either side can choose its bargaining representatives freely, when there is ill-will, usually personal, or a conflict of interest as to make good-faith bargaining impractical. ***NLRB v. Brotherhood of Teamster and Auto Truck Drivers Local No. 70***, 459 F.2d 694 (9th Cir. 1972), *quoting* ***General Electric Co. v. NLRB.***, 412 F.2d 512, 517 (2d Cir. 1969). In this case there was ill will and a conflict of interest given Gilliam's conduct, more than sufficient to support Atlas' position in objecting to Gilliam suddenly appearing at a negotiations session. Gilliam, with the Union's knowledge, defrauded Atlas of compensation he had no legal right to receive.

Atlas had been engaged in negotiations with the Union over a new CBA for over two months. At previous negotiation sessions, the Union was represented by the three member Workers' Committee. However, after spending over five hours in negotiations on May 8, 2008, Gilliam appeared at the site of negotiations, Atlas. No prior request or indication of Gilliam's participation was made. Gilliam had been replaced by the Union over two months ago as a Shop Steward and member of the Workmen's Committee. Still, on May 8, 2008, the Union took the position for the first time that it would not continue negotiations without Gilliam being present at the table.

It is ironic that the Union should raise the incident with Jeff Gilliam as an allegation of an unfair labor practice against Atlas. It was the Union that engaged in bad faith and fraud in connection with Mr. Gilliam, his continued employment under false pretenses, and their effort to disrupt negotiations by having him appear at a negotiation session.

The selection of Gilliam on the eve of the expiration of the CBA, with his undisputed history of egregious conduct against Atlas and his evident hostility toward Atlas, as well as the Union's insistence that he be part of a single negotiating session, is only lip service to its obligation to bargain in good faith. ***Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Almeda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Kockos Bro., Inc. Wissinger Trucking Service, Inc. and Silas F. Royster***, 183 NLRB No.137.

Regardless of the foregoing, the fact is that Atlas did not condition continued negotiations on the exclusion of Gilliam. Atlas immediately communicated its concerns

to the Union and the NLRB regarding the incident and, simultaneously, continued negotiations with the Union.

POINT II. The Company's Alleged Soliciation of Employee Resignation Never Occurred (Exceptions 7, 8, 10, 22 and 23)

The Company did not participate in the unlawful solicitation of employees to resign from the Union. On June 9, when a majority of the employees returned to work they were presented with a letter by Baumann (R-41 and GC-32). This letter contained the terms of employment under the final revised proposal. Baumann presented this letter so that each employee would know the terms of employment. This letter is not in dispute.

A second letter was circulated amongst employees that did not come from management of the Company. The second letter was presented to the employees by fellow employees who exercised no authority and held no agency powers on behalf of the Company. The employees circulated a form letter for their resignation from the Union. The testimony presented at trial was confused and unclear. The ALJ found both employees who testified, Goncalves and Maisonet, were confused and inconsistent in their testimony about the letters received that day and from whom they received the letters. Their confusion makes it clear that they did not understand which letter they were being questioned about. Their testimony cannot be relied upon due to that confusion.

This distinction is vital. The only way the Company can be found to be in violation of Section 8(a) for solicitation of employee resignation is if the Company engaged in coercive conduct that amounted to more than ministerial aid. *Eastern*

States Optical, Co., 275 NLRB 371, 372 (1985). The ALJ found that the actions taken by the Company constituted active encouragement of the Union members to resign from the Union. However, this conclusion is not supported. In the ALJ decisions, the ALJ found that both Schroeder and Baumann actively participated by producing form letters to the returning employees. The ALJ found this form letter to be evidence of the Company's wrongdoing, however, the form letter of resignation from the Union was presented by a fellow employee with no encouragement from management. It is also unclear if Schroeder or Baumann directly requested any of the employees to sign the form letter because the only testimony is the confused testimony of Goncalves and Maisonet. However, the ALJ found a fellow employee, Les Porzio, to be working with management. This alleged conduct does not surpass the level of ministerial aid. In *Eastern States Optical*, the Board held that no unlawful conduct was committed when the Company's attorney advised one Union employee how to word a decertification letter, because the contact was initiated by the employee, the attorney did not encourage the process of decertification, and the only advise given was editorial in nature and general public knowledge. *Id.* at 372. This follows the course of conduct taken by Porzio in the instant case. As an employee Porzio presented his fellow employees with the form letter, management did nothing, other than clerical, to encourage the process.

Even if the ALJ's finding that Baumann and Schroeder participated in the solicitation is acceptable, their conduct still does not surpass the level of ministerial aid. Nor was their conduct coercive in any way. In *Eastern States Optical* the Vice-President of the Company was charged with unlawful solicitation of employee resignation when he

was approached by an employee stating that she was interested in signing the decertification petition, he retrieved and presented the petition to her for her signature. The Union alleged that this was unlawful contact. The Board held that this action was not unlawful because the employee approached the Vice President freely to ask for the petition. The Vice-President's only conduct was handing her the petition and observing passively as she voluntarily signed. The Board found "the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees involved." *Id.* at 373.

Therefore, in light of the holding in *Eastern States Optical* and the inconsistent testimony of Goncalves and Maisonet, the finding of the ALJ should not be affirmed. The conduct of the Company did not surpass the level of ministerial and if any active participation did occur on behalf of the Company, the conduct did not occur in an atmosphere of coercion.

POINT III. The Alleged Threats of Julian Stacy Should Not Be Imputed to the Company (Exceptions 11, 12 and 21)

Julian Stacy's comments made during a telephone conversation should not be imputed to the Company. Pursuant to Company Vice President, Steve Schroeder, Stacy was not authorized to make such comments to Alers. An implied agent is defined as "actual agency arising from the conduct by the principal that implies an intention to create an agency relationship." Black's Law Dictionary (2001). Here the Union has the burden of proof to establish that Julian Stacy was acting as the Company's representative when he telephoned Alers to alert him to the situation regarding the implementation of the new contract. *In re Victory Corrugated Container Corp. of New*

Jersey, 183 B.R. 373, 376 -377 (Bkrtcy.D.N.J., 1995) *citing Blaisdell Lumber Co., Inc. v. Horton,* 242 N.J. Super. 98, 103 (App. Div. 1990). The Union must also establish that the third party, in this instance Alers, "relie[d] upon the 'principal's acts or manifestations in accepting the apparent agent's authority." *In re Victory Corrugated Container Co.,* 183 B.R at 373 *citing Sears Mortgage Corp. v. Rose,* 134 N.J. 326, 338 (1993).

The Union failed to meet this burden. It is recognized that Stacy is an agent of the company as he is a supervisor with supervisory authority; however, when he made this telephone call to Alers he was acting outside of his authority. Stacy's authority was limited to that of plant manager. This role put him in a supervisory position as defined by the NLRA, Section 2(11). However, telephoning an employee at his home residence does not fall within the scope of his supervisory powers as recognized by the Company. Therefore, the ALJ's holding that the Company violated Section 8(a)(1) on the position that Stacy was acting as an agent of the Company, when his actions were far beyond the scope of his role, should not be affirmed.

POINT IV. The Union Member Employees of Atlas Refinery Were Never Locked Out of the Facility (Exceptions 19, 24 and 25)

Black's Law Dictionary defines a lockout as "[a]n employer's withholding of work and closing of a business because of a labor's dispute." (2001). Respondents have the burden of showing a lockout did not occur. *Union Terminal Warehouse, Inc.,* 286 NLRB 851, 860 (1987). Here, Respondents have met this burden. Looking at the totality of the circumstances surrounding the events that occurred on June 9, 2008, a lockout did not occur. At no time was work withheld from the employees of Atlas Refinery, as all employees were expressly told they could return and commence work. The employees

that elected not to return were terminated and the employees that chose to enter the Company and commence work were employed under the terms of the final revised proposal. It is incorrect to conclude that work was ever withheld from the employees.

"A lockout occurs when an employer, 'for tactical reasons . . . refuses to utilize [its] employees for the performance of available work.'" *Union Terminal Warehouse, Inc.,* 286 NLRB 851, 859 (1987) *quoting* Robert A. Gorman, *Basic Text on Labor Law Unionization and Collective Bargaining* St. Paul, Minnesota (West Publishing Co. 1979). In *Union Terminal Warehouse*, the Respondent argued that a lockout did not occur when it closed the gates on employees who did not arrive for their shift, when the shift was changed and set to begin at an earlier time. Here the Board found that a lockout did occur, finding that even if the employees had arrived to work the Respondent had no intention of putting them to work and there were employees who did show to work that the Respondent did not utilize to work. *Union Terminal Warehouse,* 286 NLRB at 861. *Union Terminal Warehouse* is clearly distinguishable from the facts of the present case. On the morning on June 9, 2008, the Company had work to be done and allowed those willing to work into the facility to conduct the work. At no time were the employers turned away.

Further, in *Sargent-Welch Scientific, Co.*, following the announcement that the Respondent imposed a lockout, the Respondent shut down principle production which employed two-thirds of the staff now locked out, however, it maintained its shipping operation with those employees who were non-union. *Sargent-Welch Scientific, Co.,* 208 NLRB 811, 812 (1974). The Respondent in *Sargent-Welch* prepared for a lockout

by shutting down principle production, in the present case, Atlas had no intention on locking out its employees and had no intention of shutting down production.

It is clear to see that a lockout never occurred. Production was not shut down, and the employees who showed up to work on the morning on June 9, 2008 who were willing to work were put to work. At no time was any employee denied work. Therefore, a lockout did not occur.

POINT V: The Terms of the "Last and Final" Offer Were Lawfully Implemented as the Parties Were at a Lawful Impasse (Exceptions 1, 3, 4, 5, 6, 9, 15, 16, 17, 18, 20, 24, 25).

An impasse is defined as the state of affairs between two parties after all good faith negotiations have been exhausted and there are no reasonable prospects of concluding an agreement. *Taft Broadcasting Co.,* 163 NLRB No. 55, 478 (1965). An impasse results when the parties are unable to a reach an agreement about subjects of bargaining. 10 *Emp. Coord. Labor Relations* §36.1 (2009). The negotiations between Atlas and the Union reached this point on June 2, 2008. On June 2, 2008, after a minimum of eight negotiation sessions, the hiring of Federal mediators to assist in two further negotiation sessions, and the extension of the existing contract on two occasions, for a total of 60 days, the parties were at an impasse. They were deadlocked on critical issues to the negotiation of a new contract. The Company and the Union were so vastly apart on their respective positions that there could be no movement to reach a compromise that would be favorable to either party. Due to this vast gap between the two parties, especially over financial issues, including wages and benefits, continuing to negotiate would have been pointless. The Federal mediator recognized the stalemate the parties had reached and declared that the parties reached

an impasse. The mediator was ideally the best actor in the negotiations to declare this impasse, because as a first hand observer and neutral third party, the mediator was privy to both the negotiations and the tenure of the parties, and recognized when the breakdown in negotiations began. With this recognition the Federal mediator advised that the Company propose its best and final offer to the Union for consideration.

Determining whether an impasse has been reached is a determination of judgment. *Taft Broadcasting*, 163 NLRB at 478. The determination of an impasse requires the consideration of five factors. *Clarke Manufacturing, Inc.,* 352 NLRB No.25, 144 (2008); *Taft Broadcasting*, 163 NLRB at 478. These five factors include: (1) the bargaining history between the parties; (2) the good faith of the parties in negotiations; (3) the length of the negotiations; (4) the importance of the issue or issues as to which there is disagreement; and (5) the contemporaneous understanding of the parties as to the state of negotiations. *Id.*

The ALJ erred in determining that the parties did not reach a valid impasse. The findings in *Clarke Manufacturing* are directly on point with the present case. In *Clarke Manufacturing*, the ALJ found that Clarke did not unlawfully declare an impasse. *Clarke Manufacturing, Inc.,* 352 NLRB No.25 (2008). In *Clarke*, comparable to Atlas, this impasse was reached after only eight negotiation sessions over the course of five months. *Id.* at 143. In determining the lawfulness of the impasse, the ALJ considered the five *Taft* factors. As to the first factor, the ALJ found that there was a "well established and successful bargaining relationship" between the two parties as evidenced by previous bargaining agreements and the course of the current negotiations. *Id.* at 144. In the present case, the Company and the Union have an

established bargaining relationship as evidenced by the length and terms of the original CBA and the flexibility the Company showed in continuing to extend the terminated CBA in hopes of negotiating a new contract. The Company had been working with the Union for many decades.

The ALJ in *Clarke* further found that the parties showed a willingness to negotiate. Evidence of this willingness to negotiate included the agreement to set up dates for meetings, the presentation of proposals, the voluntary concessions made by the parties, and the friendly exchange of information when requested. *Id.* One striking similarity between *Clarke* and the present case is in *Clarke* the Union asked to see detailed information concerning a proposal and the Company freely relinquished the information for the Union's consideration. *Id.* In the present case, the Company clearly showed a willingness to negotiate providing the Union with confidential and detailed financial information and access. The Company continually asked for dates on which to meet to negotiate. Even following the failure of negotiations on May 8, 2008 because of Gilliam's presence, the Company immediately contacted the Union to express their reservations with the appearance of Gilliam, but also continued to request that further dates be set up to continue negotiations.

Further evidence of Atlas's willingness to negotiate with the Union was the production of documents regarding Atlas' financial state. This was unprecedented. However, because Atlas realized the importance of the economic issues in the negotiations they freely offered the requested materials so that the Union could have a clear understanding of the Company's financial position. While Atlas did not have to comply with this request, Atlas did so freely in the spirit of continued negotiations.

In *Clarke*, the ALJ found even though the negotiations were not advanced to a compromise, the parties still negotiated with sincerity. The same is true regarding Atlas. Atlas continued to negotiate in a good faith attempt to reach a new contract. Atlas provided the financial information the Union requested in the hopes of reaching an agreement.

Clarke held that the fourth factor, the integrity of bargaining, was evidenced by the "sincerity of the parties in attempting to arrive at an agreeable solution." *Id.* at 144. The sincerity of the parties was shown by releasing financial documents, producing insurance representatives to explain the dispute over policy costs, by the honesty of the party in negotiations, and the willingness to make concessions. *Id.* All of these factors are identical, or at least extremely similar to the facts present in the negotiations between Atlas and the Union. All throughout negotiations Atlas had been upfront and forthcoming with the Union in regards to the financial situation it now found itself in. Atlas provided financial documentation, provided a powerpoint presentation detailing the Company's deteriorating financial condition. Atlas also allowed the Union to audit the Company, offering complete access to financial information. When asked about the state of affairs, Atlas was nothing but honest and answered the questions of the Union in good faith.

In regards to the concessions, Atlas was willing to make concessions, and in fact made good faith concessions to show its willingness to negotiate a resolution. However, the movement being made was microscopic and insignificant. The concessions made by both parties were too small to reasonably expect a resolution could be reached.

This lack of productive movement was what led to the deadlock – there was just not enough movement on the important economic issues to move forward with negotiations after June 2, 2008. With the declaration by the mediator that the parties were at an impasse, the proposal by Atlas of its "best and final" offer, and the lack of communication from the Union following the June 2nd negotiation session, the Union should have realized negotiations had ceased. The Union made no further contact regarding the contract until the eleventh hour, the evening before the contract was set to expire. This course of conduct is evidence that there was a contemporaneous understanding between the parties that they were at an impasse. *Taft*, 163 NLRB at 478.

The ALJ was incorrect in concluding that the impasse was declared unlawfully. The ALJ relied on both *Beverly Farm Foundation, Inc.*, 144 F.3d. 1048 (7th Cir. 1998) and *A.M.F. Bowling Co.*, 314 NLRB 969 (1994) in finding that because the economic issues were only discussed in the final three sessions of negotiations and concluding that movement had been made, impasse had not been reached. However, it is not only the amount of times the parties met: "There is no magic number of meetings, hours, or weeks which will reliably determine when an impasse has occurred." *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 544 (1988). The ALJ failed to take into account the other *Taft* factors in reaching his conclusion, especially in light of the holding in *Clarke*. It is the "myriad of circumstances" together that evidences an impasse. The AJL should have considered the number of sessions, which totaled nine, more than that in both *Clarke* and *Beverly Farm*, and also considered the good faith exhibited in negotiations as well as the size of

the gap between the goals of the two parties. The ALJ found there was "clear movement" and "a lot of progress", however this is an incorrect assessment. Although there was movement, the parties were too far apart – the Union refused any wage cuts even fully aware that the Company's survival relied on substantial cuts to wages and benefits. At this point any continued negotiations would be fruitless.

An employer is not required to participate in further negotiations once an impasse has been reached. *National Labor Relations Bd. v. Cambria Clay Prod. Co.,* 215 F.2d. 48, 55 (6th Cir. 1954). Here, pursuant to *Clarke*, a lawful impasse had been reached. Therefore, the Company was permitted to make "unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Bridgeman v. National Basketball Ass'n.*, 675 F.Supp. 960 (D.N.J. 1987) *quoting Taft*, 163 NLRB at 476.

> . . . impasse enables the employer to make unilateral changes in working conditions that are "not substantially different or greater than any which the employer . . . proposed during the negotiations.'
>
> Impasse, in effect, temporarily suspends the usual rules of collective bargaining, by enabling the interjection of new terms and conditions into the employment relationship even though no agreement was reached through the prescribed collective-bargaining process.

McClatchy Newspaper, Inc., 321 NLRB 1386, 1389 (1996) (citations omitted).

As argued by Counsel in the trial brief, the unilateral imposition of employment conditions following the break down of good faith negotiations which resulted in an impasse is not an unfair labor practice. After June 2, 2008, when the "best and final" offer was rejected, and having received no communication from the Union regarding the offer, Atlas made revisions to the final offer in one last attempt to reach a settlement. There was no further communication from the Union until the morning of June 9, 2008

when the representative from the Union informed the Company's management that the Union members would not vote on the revised final offer and therefore refused the offer. At this time Atlas was lawful in implementing the new employment conditions of the final revised offer.

POINT VI. The Company Was Lawful in Terminating the Members of the Collective Bargaining Unit for Their Failure to Report to Work (Exceptions 25 and 26).

The Company did not violate the Act by unlawfully discharging the collective bargaining unit members because the Union failed to meet its burden of establishing the union members were fired for their involvement in protected activity. The Union has the burden to show by a preponderance of the evidence that the union members were terminated because of the Company's anti-union animus. An anti-union animus is shown by establishing (1) protected activity; (2) employer knowledge of the protected activity; and (3) animus against the protected activity. *Wright Line*, 251 NLRB 1083 (1980). The Union has failed to meet the burden, solely because the Union has failed to prove the reason for the termination of the bargaining unit members was due to their protected activity.

On June 9, 2008 there was no contract between the Union and the Company. This was established by the failure of negotiations and the impasse that had been reached. At this point in time, the Company offered to all employees those who wished to continue to work were welcome to return to the Company. This offer for employment remained opened on June 9th and closed by June 10th. At this given time, any employee who chose to return to work was allowed to under the terms of the new contract, the one rejected by the Union. Alers, Dechavez, Braudolio, Nunez and

Ardiene chose not to return to work. They were the only five employees who had not either returned to work or informed the Company that they would be returning to work following whatever pre-approved leave they were on. Their failure to return to work resulted in their termination.

No anti-union animus was shown on the part of the Company in terminating the employees as the employees that were terminated were not engaged in protected activity at the time of their termination. The contract had expired. The employees were on notice that the contract had expired. The employees were not on strike, nor engaged in any legitimate work stoppage. Negotiations had concluded. The Union refused to vote on the imposition of the final revised proposal. At this point in time the parties were at an impasse and the Company was lawfully permitted to establish new contract terms. A majority of employees accepted the new terms and came to work on June 9th. These five employees did not show up and were therefore terminated. This does not constitute protected activity.

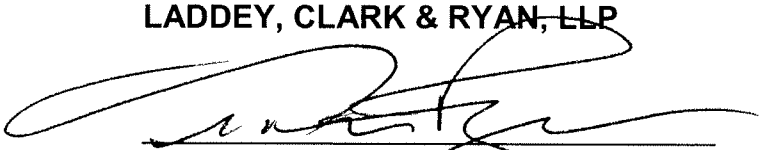
Therefore, because the Union did not show that the five employees were engaged in protected activity, the Union has failed to meet its burden in establishing that the Company acted with an anti-union animus.

V. CONCLUSION

For all the foregoing reasons, Atlas Refinery, Inc. respectfully requests that the Second Consolidated Complaint, all amendments thereto, and all underlying charges be dismissed in their entirety, that the Exceptions of Atlas Refinery, Inc. be granted and that the Decision of the ALJ be reversed to the extent that Respondent has excepted thereto.

Respectfully submitted this 18th day of September, 2009.

LADDEY, CLARK & RYAN, LLP



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